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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL GLECIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. A) Does a RICO conspiracy indictment that admittedly does not identify the specific "pattern of racketeering activity" comport with the nature of RICO and Fifth and Sixth Amendment standards?

B) Should this Court grant certiorari to resolve the inter and intra circuit split on the issue of whether a RICO conspiracy indictment must identify the "pattern of racketeering activity" comprising an alleged RICO conspiracy?

II. Should this Court resolve the split between the Second Circuit's decision in *United States v. Davidoff*, 845 F.2d 1151 (2nd Cir. 1988), which held that bills of particulars should be liberally granted in RICO conspiracy cases, and the Seventh Circuit's decision in this case which upheld the trial court's refusal to grant a bill of particulars notwithstanding the indictment's failure to identify the alleged "pattern of racketeering activity"?

III. Should the RICO statute be held void-for-vagueness?

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PRAYER

Petitioner Daniel Glecier respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals affirming Glecier's conviction for RICO conspiracy is reported at 923 F.2d 496 (7th Cir. 1991) and is attached hereto in Appendix A.

JURISDICTION

On January 8, 1991, the United States Court of Appeals for the Seventh Circuit affirmed Glecier's conviction for RICO conspiracy. Glecier filed a timely petition for rehearing, with suggestion for rehearing *en banc*. The rehearing petition was denied on February 1, 1991. *See* Appendix B. This petition is filed within ninety days of the order denying the petition for rehearing and is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> No Person shall be held to answer for a . . . infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person . . . be deprived of life, liberty, or property without due process of law.

U.S. CONST. amend. V.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.

U.S. CONST. amend. VI.

STATUTE INVOLVED

This case implicates the RICO statute. 18 U.S.C. § 1961 *et seq.* The indictment charged Glecier with conspiring to violate 18 U.S.C. § 1962(c), in violation of 18 U.S.C. § 1962(d). Title 18, United States Code, section 1962(c), provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Section 1962(d) criminalizes a "conspiracy to violate any of the provisions of subsection (a), (b) or (c) of this section".

STATEMENT OF THE CASE

The indictment named nine defendants and charged Glecier in a single RICO conspiracy count.[1] The case generally related to alleged court corruption in the Fifth Municipal District of the Circuit Court of Cook County, Illinois. Prior to trial, Glecier challenged the RICO conspiracy indictment on several grounds. Glecier maintained that the indictment was defective in that it failed to specifically describe the alleged "pattern of racketeering activity".

[1] Three defendants including Glecier went to trial. The remaining defendants pled guilty.

Glecier also argued that the RICO statute is void-for-vagueness. The trial court denied these and other pretrial motions.

The government's evidence at trial suggested the following. In the 1970s, Glecier practiced in the Fifth District as a private attorney. Government witnesses Carey Polikoff and James Costello, former prosecutors, claimed that Glecier paid bribes on unidentified criminal cases during the 1970s.

In 1979, Glecier's peers voted him an associate judge. Judge Glecier presided, *inter alia*, as a judge hearing criminal cases in the Fifth District. Costello and Polikoff claimed that they gave Glecier money on minor criminal cases when he was a judge. Polikoff could not identify any of the underlying court cases.

The jury returned a guilty verdict on the RICO conspiracy count. Although the prosecutor during closing argument expressly admitted that the evidence was much stronger against one of the defendants (a former judge), the jury acquitted Glecier's two co-defendants. The two co-defendants were accused of engaging in bribery by substantially the same witnesses that testified against Glecier.

Glecier appealed to the Seventh Circuit. On appeal, Glecier reasserted that the indictment was defective in that it failed to specify the alleged "pattern of racketeering activity." Glecier also contended that the RICO statute should be held void-for-vagueness. However, the Seventh Circuit, Chief Judge Bauer writing for the panel, affirmed Glecier's conviction.

REASONS FOR GRANTING THE PETITION

I.

A RICO CONSPIRACY INDICTMENT THAT FAILS TO SPECIFICALLY DESCRIBE THE "PATTERN OF RACKETEERING ACTIVITY" CANNOT BE RECONCILED WITH THE NATURE OF RICO AND DOES NOT SATISFY FIFTH AND SIXTH AMENDMENT STANDARDS. IN ADDITION, THE LOWER COURT'S DECISION, CONDONING SUCH A NONDESCRIPT INDICTMENT, CREATES AN INTER-CIRCUIT AND AN INTRA-CIRCUIT CONFLICT.

There is no dispute that the RICO conspiracy count failed to identify the predicate acts to which Glecier allegedly agreed. Nor did the indictment contain a substantive RICO count that specifically described the alleged "pattern of racketeering activity". A Seventh Circuit panel, however, found that a RICO conspiracy indictment need not identify the predicate acts making up the RICO conspiracy.

Four reasons compel review of this holding. First, the lower court's opinion cannot be reconciled with the nature and structure of the RICO statute. Second, not requiring identification the specific predicate acts of the conspiracy violates Fifth and Sixth Amendment pleading standards set by this Court. Third, the rule crafted in this case renders a circuit split over the question of whether a RICO conspiracy indictment must identify the "pattern of racketeering activity". Fourth, the Seventh Circuit's decision in this case conflicts with prior Seventh Circuit authority.

A. The Lower Court's Opinion Fails To Accord Recognition To Crime Within A Crime Nature Of RICO.

To ascertain the pleading requirements for RICO conspiracy, it is important to understand the nature of the crime involved. The RICO statute (including the RICO conspiracy aspect) does not:

> create 'new crimes' but serve[s] as the prerequisite for the invocation of increased sanctions for conduct which is proscribed elsewhere in both federal and state criminal codes . . . Thus, the use of the term 'RICO conspiracy,' . . . is to some extent a misnomer. Section 1962(d), like the section's other provisions, is only applicable when the defendant has violated other laws in a context that implicates RICO.

United States v. Neapolitan, 791 F.2d 489 (7th Cir. 1986).

Notwithstanding this, the Seventh Circuit refused to require identification of the specific predicate acts allegedly comprising the RICO conspiracy. To not require such identification flies in the face of the notion that RICO conspiracy is not actually a new crime, but is a prerequisite for increased punishment for conduct prohibited by other federal and state criminal codes. Needless to say, we all would feel uncomfortable with a bribery conspiracy indictment that failed to yield specifics about the alleged bribery. The mere fact that the alleged bribery arises in the context of RICO should not take away from the requirements for a criminal indictment. Yet, the result in this case condones unclear, undetailed, unspecific and nebulous RICO conspiracy indictments. This Court should put a stop to such a dangerous precedent.[2]

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[2] The Seventh Circuit concluded that an indictment for a violation of § 1962(d) must identify "a proper enterprise and the defendant's

(Footnote continued on following page)

B. Not Requiring A RICO Conspiracy Indictment To Identify The Predicate Acts Of The Alleged Conspiracy Violates The Fifth Amendment Right To Be Indicted By A Grand Jury And The Sixth Amendment Right To Know The Nature And Cause Of The Accusations.

Under the Fifth Amendment the accused has a right to be indicted by a grand jury and the Sixth Amendment provides that "[in] all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation". U.S. CONST. amend. VI. To pass constitutional muster, an indictment must state all of the elements of the charged offense, inform the accused of the nature of the charge so that a defense can be prepared and specify the charged conduct so that a double jeopardy bar may be raised. *United States v. Russell*, 369 U.S. 749 (1962). Further, Rule 7(c)(1) of the Federal Rules of Criminal Procedure mandates inclusion "of the essential facts of constituting the offense charged". The lower court's opinion in this case conflicts with these well-established pleading standards.

The indictment, returned in December, 1987, said that the conspiracy lasted from June, 1977 to August, 1983.

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[2] *continued*
association with that enterprise . . . [and] that the defendant knowingly joined a conspiracy the objective of which was to operate that enterprise through an identified pattern of racketeering activity (here, the 'pattern' being multiple acts of bribery . . .)". *Glecier*, 923 F.2d at 500. The court mandated *identification* of the enterprise and the defendant's association with it, but stopped short of requiring identification of the specific predicate acts comprising the conspiracy. Both the enterprise and the defendant's association with it are elements of a substantive RICO offense, 18 U.S.C. § 1962(c). There is no basis for requiring factual identification of those elements in a § 1962(d) case, but not the facts concerning the pattern of racketeering element, especially in light of the fact that the "pattern of racketeering" will amount to the central point of dispute in most, if not all, RICO conspiracy trials.

With respect to Glecier, it only alleged, *absent particulars*, that he discussed which judges, police officers and prosecutors would accept bribes, that he accepted cash bribes from attorneys and that he paid bribes to Assistant State's Attorneys Costello and Polikoff. The facts, circumstances, dates, locations, parties present, case names or bribe amounts regarding the specific predicate acts supposedly agreed to by Glecier were not set forth in the indictment. Thus, the vague, nebulous and broad indictment did not satisfy Rule 7(c)(1) and failed "to descend to particulars", *United States v. Cruickshank*, 92 U.S. 542, 558 (1875), in violation of the Sixth Amendment standards established by this Court. *See Russell*, 369 U.S. at 765, 768 n. 15 (1962) (requiring "a statement of the facts and circumstances of an offense"; *Cruickshank* "retains undiminished vitality"); *United States v. Hess*, 124 U.S. 483, 487 (1888) ("Facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.").

In addition, the indictment also did not protect Glecier's double jeopardy rights. To constitute double jeopardy in the RICO context:

> *both* the enterprise and the pattern of activity alleged in the [earlier] indictment must be the same as those alleged in the [second] indictment. If either is different, there is no infirmity under the double jeopardy clause.

United States v. Langella, 804 F.2d 185, 189 (2nd Cir. 1986); *United States v. Russotti*, 717 F.2d 27, 33 (2nd Cir. 1983). Even when the enterprises in two different prosecutions are the same, there is no double jeopardy problem if the pattern of racketeering activity is different. *Langella*, 804 F.2d at 189. To show a double jeopardy bar,

Glecier would be required to demonstrate, *inter alia*, that the pattern of racketeering activity in each indictment is the same. Thus, the indictment here is flawed because it failed to identify the racketeering acts agreed to as part of the RICO conspiracy and cannot be used to raise a double jeopardy bar.

The indictment also violated the Fifth Amendment right to be indicted by a grand jury. It is elementary that a defendant cannot be convicted on the basis of facts not found or presented to the grand jury. *E.g.*, *Stirone v. United States*, 361 U.S. 212 (1960); *Russell*, 369 U.S. at 770; *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937). While it can be said that viewing the evidence in a light most favorable to the government, the government showed the specifics of some predicate acts at trial, those acts certainly were not specified in the indictment. In view of the vague, conclusory, nebulous and broad indictment that did not identify the predicate acts of bribery or correspond with the proof, Glecier was convicted absent the grand jury considering the specific predicate racketeering acts of the RICO charge—an error fatal to his conviction. *E.g.*, *Stirone*, 361 U.S. at 219.

Over 100 years have elapsed since this Court condemned the technique of giving the prosecutor free reign to develop, at trial, essential specifics unconsidered by the grand jury. *Ex Parte Bain*, 121 U.S. 1 (1887). *See also Russell*, 369 U.S. at 768 (prosecution cannot be "free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial"). Yet, that is exactly what happened in this case: The broad and unspecific indictment gave the prosecution flexibility to develop proof of specific criminal acts at trial absent grand jury consideration or notice to the accused. Such

a tactic cannot be countenanced and is in violation of the Constitution.

RICO has been criticized in some quarters for being too vague, see *H.J., Inc. v. Northwestern Bell Telephone*, 109 S. Ct. 2893, 2909 (1989) (Scalia, J., concurring). The lower court's decision adds to the aura of marked confusion surrounding RICO by permitting prosecutors, in crafting RICO conspiracy indictments, to conceal the criminal activity they intend to prove at trial. Such a result violates the Fifth and Sixth Amendment pleading requirements established by this Court. Certiorari should be granted.

C. The Circuits Are Split On The Issue Of Whether A RICO Conspiracy Indictment Must Identify The Alleged "Pattern Of Racketeering Activity".

The lower court's decision also conflicts with decisions from other federal courts. In *United States v. Phillips*, 874 F.2d 123 (3rd Cir. 1989), the court stated, "We are initially troubled by the sufficiency of Count I of the indictment because of its failure to specify, with particularity, which acts of bribery and extortion appellants allegedly agreed to commit." *Id.* at 127 n. 4.[3] In addition, the *Phillips* court stated "the predicate acts underlying the RICO conspiracy charge be specified, rather than generally identified". *Id.* at 130 n. 7. In *United States v. Angiula*, 847 F.2d 956, 964 (1st Cir. 1988), the court also commented on the need for specification of the underlying predicate acts in a RICO conspiracy charge, stating:

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[3] The court in *Phillips* concluded that the appellants waived the issue by failing to contest the denial of their request for a bill of particulars. In contrast, Glecier requested a bill of particulars and challenged the trial court's refusal to order a bill of particulars on appeal. See also *supra* § II.

> in any RICO conspiracy indictment the government must allege agreement to commit or commission of *specified* predicate crimes or, alternatively the collection of unlawful debts. That specificity is sufficient to alert defendants to the nature of the conspiracy for which they are being charged.

Id. at 964 (emphasis original). Similarly, in *United States v. Gatto*, 746 F. Supp. 432, 459-60 (D. N.J. 1990), the court recently ruled that a RICO conspiracy count that generally described the pattern of racketeering activity was insufficient, but concluded that the defect could be cured by a bill of particulars.

Obviously, the lower court's decision in this case conflicts with these decisions. This Honorable Court should grant certiorari to harmonize the split in authority over this important RICO issue.

D. The Seventh Circuit's Decision In This Case Conflicts With Its Prior Decision In *United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986).

An intra-circuit split also exists on the issue of whether a RICO conspiracy indictment must identify the predicate acts comprising the alleged pattern of racketeering activity. In this case, the court deemed sufficient an indictment that identified the "pattern of racketeering activity" in a RICO conspiracy as "being multiple acts of bribery" in violation of state law. In *Neapolitan*, the Seventh Circuit precluded such generalized specification of the central criminal conduct. The *Neapolitan* court stated:

> Thus, it would be sufficient, according to this argument, for the indictment to state that *the defendant engaged in various acts of bribery. This argument misconceives the nature of any RICO offense. Under*

> *the statutory scheme the predicate acts are not only important 'elements of the crime' but they are also by definition, distinct offenses.* Because RICO provides for the commission of these predicate crimes in a specified context . . . *the failure to specify the underlying criminal activity in the indictment can effectively preclude exact identification of what is being charged.* RICO cannot be viewed as a complete offense distinct from the underlying crimes upon which it is based.

791 F.2d at 501 (emphasis supplied).

The Seventh Circuit said that this passage "most certainly does not stand for the proposition that RICO conspiracy indictments must list specific predicate acts in which the defendant was involved." *Glecier*, 923 F.2d at 501. However, the *Neapolitan* Court explained that a RICO conspiracy indictment is *insufficient* if it alleges (in reference to the pattern requirement) "*the defendant engaged in various acts of bribery*"—the very allegation made in the present indictment. Moreover, *Neapolitan*'s statement that "*the failure to specify the underlying criminal activity in the indictment can effectively preclude exact identification of what is being charged*" certainly evidences an assumption, and a direction, that a RICO conspiracy indictment must identify the predicate acts allegedly agreed to by a defendant. The *Neapolitan* court also stressed that it was, *inter alia*, addressing "*the special burden RICO conspiracy imposes on . . . the crafting of indictments*". 791 F.2d at 491 (emphasis added). Accordingly, a fair interpretation of *Neapolitan* inexorably leads to the conclusion that a RICO conspiracy indictment must specifically identify the alleged pattern of racketeering activity.

The panel in this case attempted to distinguish *Neapolitan* by saying that the relied-upon passage constituted a

response to the government proving predicate acts that were not charged in a RICO conspiracy indictment that did, at least, allege some predicate acts. *Neapolitan* concluded that it was impermissible for the prosecution to step outside the indictment's allegations by proving predicate acts not set forth in the indictment. If this is the construction to be placed on the quoted passage from *Neapolitan*, then outright reversal should have been ordered since the government's proof wholly exceeded the indictment given that the present indictment contained *no* specific predicate acts. Moreover, it certainly is anomalous for the government to "[get] into trouble", *Glecier*, 923 F.2d at 501, by putting in proof in a case where the indictment actually described specific predicate acts, but engage in tolerable conduct by crafting a RICO conspiracy indictment that does not identify any predicate acts with specificity.

The court also contradicted itself in dealing with the relied-upon passage from *Neapolitan*. On one hand, the court claimed that the quoted passage from *Neapolitan* "most certainly does not stand for the proposition that RICO conspiracy indictments must list specific predicate acts in which the defendant was involved." *Glecier*, 923 F.2d at 501. However, in the next breath, the court contended that this language from *Neapolitan* can be read to set some standard for the crafting of indictments, stating "[a]t most . . . [it] sets an outer boundary for RICO conspiracy indictments at a mere allegation of 'various acts of bribery' "! *Id.* The court then reasoned that the RICO conspiracy indictment in this case "contains sufficient information to fall well within that boundary". *Id.* However, an analysis of the facts adduced at trial, in reference to the indictment, demonstrate the patent inade-

quacy of the indictment. Indeed, there is no dispute that with respect to the crux of the damaging evidence against Glecier, the indictment failed to provide notice.

As can be seen, the lower court's opinion is inconsistent internally, and with prior Seventh Circuit authority. This Court should grant certiorari to resolve the dilemma.

II.

THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE SECOND CIRCUIT'S DECISION IN *UNITED STATES v. DAVIDOFF*, 845 F.2D 1151, 1154 (2ND CIR. 1988), WHICH HELD THAT BILLS OF PARTICULARS SHOULD BE LIBERALLY GRANTED IN RICO CONSPIRACY CASES, AND THE SEVENTH CIRCUIT'S DECISION IN THIS CASE WHICH UPHELD THE TRIAL COURT'S REFUSAL TO GRANT A BILL OF PARTICULARS NOTWITHSTANDING THE INDICTMENT'S FAILURE TO IDENTIFY THE ALLEGED "PATTERN OF RACKETEERING ACTIVITY".

Forced to a defend against an indictment devoid of particulars, but specifying a seven year conspiracy involving many players and one that ceased approximately five years before trial, Glecier moved for a bill of particulars. The motion sought, *inter alia*, identification of the particulars surrounding the alleged multiple acts of bribery. The trial court denied the motion. This decision was upheld on appeal. The Seventh Circuit's decision, allowing the denial of a bill of particulars notwithstanding a RICO conspiracy indictment's failure to identify the specific "pattern of racketeering activity", conflicts with the Second Circuit's decision in *United States v. Davidoff*, 845 F.2d 1151, 1154 (2nd Cir. 1988).

In *Davidoff*, the RICO conspiracy count identified the predicate acts as including, but not being limited to, the four substantive counts. The defendant moved for a bill of particulars, seeking identification of the unspecified predicate acts in the RICO conspiracy count. The trial court denied the motion. On appeal, the court found that the defendant was entitled to a bill of particulars, notifying him of at least the alleged unnamed victims of his extortion scheme. The court deemed it unrealistic to believe that the defendant could have been prepared to meet charges not alleged prior to trial. Further, the court ruled that the government's turning over of Jencks Act materials did not suffice to provide the defendant with notice. Accordingly, the court reversed the defendant's RICO conspiracy conviction. In so doing, the court stressed that the principles pertaining to bills of particulars must be applied with care to indictments charging:

> criminal offenses under statutes as broad as RICO. With the wide latitude accorded to the prosecution to frame a charge that a defendant has 'conspired' to promote the affairs of an 'enterprise' through a pattern of racketeering activity' comes an obligation to particularize the nature of the charge to a degree that might not be necessary in the prosecution of crimes of more limited scope.

Davidoff, 845 F.2d at 1154. *See also United States v. McDonnell*, 696 F. Supp. 356, 362 (N.D. Ill. 1988) (bill of particulars requests granted in RICO case); *United States v. Bailey*, 689 F. Supp. 1463, 1473 (N.D. Ill. 1987) (ordering bill of particulars in light of vague enterprise allegation).

Obviously, there is a conflict between *Davidoff* and this case. Moreover, in this case, the facts (demanding a bill of particulars) are even more compelling than those in *Davidoff*. With respect to the damaging evidence against Glecier, neither the indictment nor a bill of particulars

provided notice. In spite of this, the Seventh Circuit stated that "the extent of pre-trial discovery is the primary factor that distinguishes this case from *United States v. Davidoff*, 845 F.2d 1151 (2nd Cir. 1988)". *Glecier*, 923 F.2d at 502 n. 5. However, the alleged pre-trial discovery cannot be a realistic basis on which to distinguish *Davidoff*. In *Davidoff*, the court stated, "[n]or can the Government excuse the lack of a bill of particulars by contending that information concerning [the victims not specified in the indictment] was contained in Jencks Act statements" turned over during jury selection and during the trial. In addition, the government in *Davidoff* tendered "some 6,000 pages" of wiretap material; however, the *Davidoff* court deemed this turn-over as an "equally inadequate" cure for the lack of bill of particulars. *Davidoff*, 845 F.2d at 1155. Thus, it cannot be said that a difference in pre-trial discovery forms a sufficient basis upon which to distinguish *Davidoff*.

Moreover, upon analysis, the factors relied upon by the court in this case (e.g., the *Santiago* proffer, tape recordings, and a witness interview) for excusing the ordering of a bill of particulars are not persuasive. First, the filing of a *Santiago* proffer cannot be a substitute for a bill of particulars; both serve very different functions. And, contrary to the statement of the lower court, the *Santiago* proffer in this case did not allude to all of the specific acts that became the subject of the trial. Further, the *Santiago* proffer was filed a mere five days before trial—a fact not mentioned by the panel. Second, while the panel claimed that the government made available "tape recordings of the defendants", tape recordings of defendants were not introduced at trial, and we do not know of the existence (or the tendering during discovery) of any tape recording of a defendant. (The tapes intro-

duced at trial involved undercover operative Terry Hake and James Costello, a cooperating witness who was not named as a defendant in the present case.) Finally, the interview alluded to by the court, was an interview of a government witness (William Kampegna) who testified at trial that he did not bribe Judge Glecier. Hence, upon analysis, it can be seen that the factors relied upon by the court simply are not meaningful substitutes for a bill of particulars; nor are they a cure for a nebulous indictment that failed to identify the specific of the "pattern of racketeering activity" comprising the alleged RICO conspiracy.

As can be seen the Seventh Circuit's reasoning is wanting and its holding conflicts with *Davidoff*. Further, the lower court's decision accords far too much power—and potential for abuse—to prosecutors of RICO conspiracy charges: They now need not provide the RICO conspiracy defendant with any meaningful notice through the vehicle of an indictment or bill of particulars. This Honorable Court should grant certiorari and put a stop to the dangerous precedent set in this case.

III.

THIS COURT SHOULD HOLD THE RICO STATUTE VOID-FOR-VAGUENESS.

Since its enactment in 1970, the RICO statute has been the source of debate, confusion and condemnation. At the same time, RICO has become the darling of the prosecutor's toolbox. In any event, RICO's terms have been almost universally recognized as elusive, and seem to have caused more circuit splits than any other modern statute.

This Court has yet to squarely address the issue of whether the federal RICO statute is void-for-vagueness.

The time has come. Indeed, in *H.J. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2891 (1989), Justice Scalia recently invited such a challenge, stating:

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

Id. at 2906-07.

Constitutional assessment of the RICO statute is ripe for this Court's review. We acknowledge that RICO has withstood prior constitutional challenges in courts of appeal, see, e.g., *United States v. Morelli*, 643 F.2d 402, 412 (6th Cir. 1981) (collecting cases), although at least one court declared RICO unconstitutional. *Firestone v. Galbreath*, 747 F. Supp. 1556 (S.D. Ohio 1990). That the constitutionality of RICO has stood the test of time in the lower courts does not render RICO definitively constitutional. *Cf. McNally v. United States*, 107 S. Ct. 2875 (1987) (repudiating "intangible rights" theory of mail fraud notwithstanding it being long accepted by the lower courts). The test of time and the inability of the courts to lend meaningful and consistent substance to the concepts embodied in RICO mandate reconsideration of such decisions. Furthermore, the concurring opinion in *H.J.* has activated repeated constitutional challenges to RICO that will not cease until this Court resolves the issue. *See* Note, *"Mother of Mercy—Is This The End of Rico?" Justice Scalia Invites Constitutional Void-For-Vagueness Challenge to RICO "Pattern"*, 65 Notre Dame L. Rev. 1107, 1111 n. 35 (1990).

So, for purposes of this certiorari petition, we turn to the constitutionality of RICO. The standard guiding the analysis is clear: "It is a basic principle of due process that an enactment is void-for-vagueness if its prohibitions are not clearly defined". *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A statute is void-for-vagueness when it fails to notify what conduct is proscribed by its terms and men of common intelligence must guess at the meaning of a statute. *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). *See also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

The RICO statute is replete with ambiguous and uncertain terms. It is much like the gangster statute that this Court held unconstitutional in *Lanzetta*. Moreover, as the profound splits in authority concerning application of RICO make unquestionably clear, men of common intelligence—and superior intelligence for that matter—have failed to divine the meaning of RICO's terms. If the courts cannot ascertain the meaning of RICO, then how can the ordinary man? Of course, as the above cited cases make clear, if the ordinary man must guess at the meaning of a statute, it fails to pass constitutional muster. In short, experience under RICO has shown that the statute simply is too vague and does not lend itself to meaningful definition.

RICO's vagueness and lack of definition is even more profound and compelling in the conspiracy context. The crime of conspiracy has been criticized because of its inherent vagueness. *See, e.g., Grunewald v. United States*, 353 U.S. 391, 404 (1957); *Krulewitch v. United States*, 336 U.S. 440, 445-58 (1949) (Jackson, J., concurring). This condemnation is even more efficacious in the context of RICO

given the inherent ambiguity associated with the supposed object of the conspiracy—a violation of 1962(a-c).[4]

The RICO statute also is overbroad. It is fundamental, under the Due Process Clause, that guilt remain "individual and personal". *Kotteakos v. United States*, 328 U.S. 750, 772 (1946). The net cast by RICO conspiracy simply is too sweeping. The statute allows the imposition of drastic remedies, for even "the smallest fish"—those who are merely associated with an enterprise and indirectly participate in its affairs. *United States v. Elliot*, 571 F.2d 880, 903 (5th Cir. 1978). As this case vividly illustrates, RICO is constitutionally infirm because it requires the accused to defend against undefined conduct, conduct for which he has no knowledge and is not responsible for, and ancient alleged acts. The Due Process Clause prohibits such. Certiorari should be granted and the RICO statute should be held unconstitutional.[5]

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[4] Due to its vagueness and the resultant non-establishment of guidelines to govern prosecutors, RICO also "reveals a significant risk of encouraging 'arbitrary and discriminatory enforcement.'" Robinson, *Mother of Mercy, Is This the End of Rico?*, VI ABA, Criminal Justice 13, 15 (Spring 1991). *See also Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

[5] The alignment of the Court on the issue of whether RICO may be void-for-vagueness is noteworthy. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined Justice Scalia in his concurring opinion in *H.J.*. Dissenting in *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989) (a case involving a state RICO statute), Justices Marshall and Stevens seemingly recognized the vagueness inherent in RICO.

CONCLUSION

WHEREFORE, Petitioner Daniel Glecier respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-3417

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL P. GLECIER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 928—**Charles R. Norgle,** *Judge.*

ARGUED FEBRUARY 28, 1990—DECIDED JANUARY 8, 1991

Before BAUER, *Chief Judge*, POSNER and MANION, *Circuit Judges.*

BAUER, *Chief Judge.* In one of the last "Greylord" cases to make its way through our court, Daniel P. Glecier, a former judge of the Fifth Municipal District of the Circuit Court of Cook County, appeals his conviction for RICO conspiracy. Glecier raises a number of challenges to his conviction, only a handful of which merit discussion.[1] None

[1] As for Glecier's challenges to certain jury instructions that the district court rejected and others that it gave, suffice it to say that, viewing the instructions as a whole and in light of the evidence and arguments at trial, we find no reversible error. *See*

(Footnote continued on following page)

of Glecier's discussion-worthy challenges are particularly fact intensive. Thus, we will forego a lengthy recitation of the facts and instead briefly review any necessary background in the course of disposing of the issues.

I. The Indictment

On March 16, 1988, the September 1986 Grand Jury returned a superseding indictment charging Glecier and nine co-defendants with fifteen counts of conspiracy, mail fraud and tax violations. The only portion of the indictment that names Glecier is Count One, which, as we discuss in detail below, charges him with conspiring to violate provisions of Illinois law in a context that implicates the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. § 1962(d). Nowhere in the indictment is Glecier charged with personally committing predicate acts that implicate RICO.

Because Glecier's primary arguments on appeal center on the indictment, we will examine Count One in some detail. Count One begins by identifying the "enterprise" (the Circuit Court of Cook County), as well as the named

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[1] *continued*
United States v. McNeese, 901 F.2d 585, 607-09 (7th Cir. 1990); *United States v. Sims*, 895 F.2d 326, 329 (7th Cir. 1990).

As for Glecier's challenge to the constitutionality of the RICO statute, *United States v. Aleman*, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 455 U.S. 946 (1980), and the flood of cases from other circuits, *see, e.g., United States v. Tripp*, 782 F.2d 38, 42 (6th Cir.) (collecting cases), *cert. denied*, 475 U.S. 1128 (1986), have settled that issue to our satisfaction. We also join the First and Third Circuits in re-affirming that the RICO statute is not unconstitutional despite Justice Scalia's statements concerning the pattern requirement in his concurrence in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893, 2909 (1989) (Scalia, J., concurring) (*dictum*). *See United States v. Pungitore*, 910 F.2d 1084, 1102-05 (3rd Cir. 1990); *United States v. Anguilo*, 897 F.2d 1169, 1179-80 (1st Cir.), *cert. denied*, 111 S.Ct. 130 (1990). *See also* Note, "Mother of Mercy—Is This The End of Rico?"—*Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO Pattern*, 65 Notre Dame L. Rev. 1106, 1132-44 (1990).

co-conspirators and defendants and their positions. Paragraph 1(d)(2) identifies Glecier as "an Associate Judge assigned to the Fifth Municipal District from approximately July 23, 1979 to September 28, 1979 and again from approximately December, 1980 to December, 1987." (Glecier spent part of the time between these periods on assignment to Branch 27 at Harrison and Kedzie, outside of the Fifth District.) After identifying all the players and reproducing the Illinois statutes criminalizing bribery and official misconduct, Count One charges the following:

> From in or about June, 1977 to in or about September, 1983, at Chicago Ridge, Oak Lawn, Justice, Worth, Summit, and elsewhere, in the Northern District of Illinois, Eastern Division, [Glecier and seven other defendants], being associated with an enterprise [the Circuit Court of Cook County], did knowingly conspire and agree, together with Roger Seaman [another defendant], and other judges assigned to the Fifth Municipal District, as well as Cary N. Polikoff [the last defendant], William H. Kampenga, Hugo Arquilla, and others known and unknown to the Grand Jury, to conduct and participate in the conduct of the affairs of the Circuit Court of Cook County, directly and indirectly, through a pattern of racketeering activity, as that term is defined in [18 U.S.C. § 1961], said racketeering activity consisting of multiple acts involving bribery under [Ill. Rev. Stat. ch. 38, secs. 33-1 & 33-3].

Count One goes on to describe the role played by defendant John W. Brady, a former assistant state's attorney, in the solicitation of willing participants in the scheme. Brady is alleged to have recruited both judges and attorneys in the Fifth Municipal District to take part in cash bribes. It is then alleged that Glecier participated in this scheme before he assumed the bench:

> It was further part of the conspiracy that certain corrupt attorneys who practiced in the Fifth Municipal District, including JOHN W. BRADY, [five other

> defendants] and DANIEL P. GLECIER, as well as Cary N. Polikoff, William H. Kampenga, Hugo Arquilla, James J. Costello, Joseph McDermott, and others discussed at various times, among one another and with others, which judges, prosecutors and police officers would and did accept cash bribes from attorneys in exchange for favored treatment or to otherwise influence them in the performance of acts related to their employment and function as judges, prosecutors, and police officers in the Fifth Municipal District.

Count One goes on the describe how judges in the Fifth District [Glecier is not mentioned by name] solicited and accepted bribes for "steering" cases involving unrepresented defendants to attorneys who paid for that favor. Finally, in two of the last paragraphs in Count One, Glecier is again mentioned by name. Paragraph 10 lists him as one of the Fifth District judges who "did at various times unlawfully accept cash bribes from or on behalf of attorneys, including [six of the named defendants] and others known and unknown to the Grand Jury, pursuant to an understanding that they would be influenced in, and knowing that the cash bribes were tendered with the intention of influencing them in, the performance of acts related to their employment and function as judges." Paragraph 11 returns to Glecier's days as a trial lawyer, including his name in the list of attorneys from whom assistant state's attorneys Costello, Polikoff and Brady accepted bribes.

Glecier has alleged that, by failing to specify individual predicate acts of racketeering (i.e., listing the specific bribes by date and/or case name) about which Glecier is supposed to have conspired, the indictment violated the fifth and sixth amendments, Rule 7(c)(1) of the Federal Rules of Criminal Procedure, and the standards for RICO indictments we discussed in *United States v. Neapolitan*, 791 F.2d 489 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986). Glecier first raised these challenges in a pre-trial motion to dismiss the indictment. In an order dated June 10, 1988, the district court denied that motion and ruled that Count

One was sufficiently specific and informative under the legal standards for indictments. The court explicitly rejected Glecier's argument that, under *Neapolitan*, the specific predicate acts to which a RICO conspiracy defendant is alleged to have agreed constitute elements of the offense or otherwise must be set forth in a RICO conspiracy indictment. Glecier charges error in these conclusions. As the issue here is the legal sufficiency of the indictment, we will review the matter afresh; although we note that "[i]n reviewing the sufficiency of an indictment, a court should consider the challenged count as a whole and should refrain from reading it in a hypertechnical manner." *United States v. Gironda*, 758 F.2d 1201, 1209 (7th Cir. 1985) (citations omitted).

The fifth amendment, with exceptions not relevant here, limits the power of the federal government to hold someone to answer for a felony "unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend V. The sixth amendment then grants to all persons accused by the federal government of a crime several basic rights, including the right "to be informed of the nature and cause of the accusation." U.S. CONST. amend VI. The courts have long held that these broad principles break down into three requirements (sometimes grouped as two requirements, *see, e.g., Hamling v. United States*, 418 U.S. 87, 117 (1974)) for the sufficiency of an indictment: "The defendant is entitled to an indictment that [1] states all of the elements of the offense charged, [2] informs him of the nature of the charge so that a defense can be prepared, and [3] enables the defendant to evaluate any possible double jeopardy problems presented by the charge." *Neapolitan*, 791 F.2d at 500-01 (citations omitted). The RICO conspiracy count in the instant indictment meets these requirements.[2]

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[2] We note that an indictment that meets these Constitutionally-inspired requirements also satisfies the specificity requirements of Fed. R. Crim. P. 7(c)(1), which states that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." *See McNeese*, 901 F.2d at 604 n.9.

First, Count One properly alleges all the essential elements of RICO conspiracy. For purposes of clarity, we should note that "RICO conspiracy," strictly speaking, is a misnomer, insofar as it is used to imply a special substantive offense different from any other conspiracy under 18 U.S.C. § 371.[3] All that 18 U.S.C. § 1962(d), the "RICO conspiracy statute," provides is that it is unlawful "to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section." Section 1962(c), the familiar "substantive" RICO provision, criminalizes the participation in the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity. Section 1962(d), like all conspiracy provisions, has as its target the act of agreement—here, the agreement to engage in activity that implicates section 1962(c). Accordingly, to list adequately the elements of section 1962(d), an indictment need only charge—after identifying a proper enterprise and the defendant's association with that enterprise—that the defendant knowingly joined a conspiracy the objective of which was to operate that enterprise through an identified pattern of racketeering activity (here, the "pattern" being multiple acts of bribery prohibited by specified provisions of the Illinois criminal code). Neither overt acts, *United States v. Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988), nor specific predicate acts that the defendant agreed personally to commit, *Neapolitan*, 791 F.2d at 495-98, need be alleged or proved for a section 1962(d) offense. As the above-quoted sections of Count One demonstrate, the instant indictment contains these requisite elements.

The indictment also satisfies the second and third requirements for indictment sufficiency. By specifying the time period during which the alleged conspiracy operated, the locations and courts, the principal actors, and, with some detail, the specific types of predicate crimes to be

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[3] We here paraphrase the more lengthy discussion of this point found in *Neapolitan*, 791 F.2d at 495.

committed and the *modus operandi* of the conspiracy, the indictment adequately enabled Glecier to prepare a defense. Similarly, the specific, limiting information contained in Count One is sufficient to bar any subsequent prosecution for RICO conspiracy during the same time period and involving the same co-conspirators, enterprise and racketeering activities. *See United States v. Marren*, 890 F.2d 924, 934-35 (7th Cir. 1989) (discussing and applying double jeopardy test for successive RICO conspiracy charges). Contrary to Glecier's argument, these notice and double jeopardy factors do not require the recitation of specific case names, dates, times, and places of alleged bribes. As we discuss below, the government did in fact present evidence at trial of specific cases and incidents in which Glecier agreed to give or take bribes. Count One was sufficiently precise even to allow Glecier to prepare to defend against this evidence, as the principal actors involved in these incidents, the method and context of these bribes, and the time period within which they took place are all contained within Count One.

The primary support Glecier cites for his contention that specific predicate acts to which he conspired should have been listed in the indictment is a passage in our opinion in *Neapolitan*, 791 F.2d 489. In the relied-upon passage, we addressed a claim by one of the defendants (Neapolitan) that the government improperly had exceeded the scope of the indictment by introducing at trial evidence of bribes that were not listed in the RICO conspiracy count.[4] The government responded to this claim by contending that the predicate acts unspecified in the indictment but proved at trial were not separate, charged offenses but evidentiary support for the conspiracy charge. To which we, in turn, responded as follows:

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[4] We note that Glecier raises (in a summary fashion) this same challenge to his indictment. Just as the failure to specify in the indictment every predicate crime introduced at trial did not require the disturbance of the conviction in *Neapolitan*, 791 F.2d at 501-02, any similar shortcoming in the instant indictment does not warrant reversal of Glecier's conviction.

> [I]t would be sufficient, according to [the government's] argument, for the indictment to state that the defendant engaged in various acts of bribery. This argument misconceives the nature of any RICO offense. Under the statutory scheme the predicate acts are not only important "elements of the crime" but they are also, by definition, distinct offenses. Because RICO provides increased penalties for the commission of these predicate crimes in a specified context, . . . the failure to specify the underlying criminal activity in the indictment can effectively preclude the exact identification of what is being charged. RICO cannot be viewed as a complete offense distinct from the underlying crimes upon which it is based.

791 F.2d at 501.

This passage cannot support the weight placed upon it by Glecier. First, it most certainly does not stand for the proposition that RICO conspiracy indictments must list specific predicate acts in which the defendant was involved. It so happens that the RICO conspiracy count at issue in *Neapolitan* did list particular acts of bribery in which Neapolitan and the other defendants were involved, which explains why the government got into trouble when it sought to prove the conspiracy charge against Neapolitan with evidence of other crimes not contained in the count. Thus, we found that these unspecified crimes were "largely irrelevant to the establishing of the RICO conspiracy *alleged by the government in this case.*" *Id.* at 500 (emphasis in original). Second, even apart from this contextual difference, the instant indictment does not run afoul of the principles espoused in the quoted passage from *Neapolitan*. At most, that language sets an outer boundary for RICO conspiracy indictments at a mere allegation of "various acts of bribery." As detailed above, Count One contains sufficient information to fall well within that boundary. And finally, Glecier's argument based on this passage simply cannot be a correct statement of the law. If the government were required to identify, in indictments charg-

ing violation only of section 1962(d), specific predicate acts in which the defendant was involved, then a 1962(d) charge would have all of the elements necessary for a substantive RICO charge. Section 1962(d) would thus become a nullity, as it would criminalize no conduct not already covered by sections 1962(a) through (c). Such a result, quite obviously, would violate the statutory scheme in which conspiracy to engage in the conduct described in sections 1962(a) through (c) is itself a separate crime. As mentioned above, that separate crime centers on the act of *agreement*, which makes unnecessary—and in many cases impossible—the identification in the indictment of specific predicate acts that have come to fruition.

Thus, the indictment is sufficient under the Constitution, the Federal Rules and the case law. *Cf. United States v. Sutherland*, 656 F.2d 1181, 1197 (5th Cir. 1981) (similar "lack of specificity" challenge to RICO conspiracy indictment rejected where indictment identified the pattern of racketeering activity as "a number of bribes that occurred between November 1975 and January 1980"), *cert. denied*, 455 U.S. 949 (1982). *See also United States v. Phillips*, 874 F.2d 123, 127-28 n.4 (3rd Cir. 1989).

II. The Motion for a Bill of Particulars

Related to his attack on the legal sufficiency of the indictment, Glecier has claimed that the indictment's lack of specificity created a danger of prejudicial surprise and prevented him from adequately preparing for his defense, mandating a bill of particulars. This issue was first presented to the district court in a joint motion by the defendants. Satisfied with the clarity of the indictment, impressed by the volume of documents and records the government had made available to the defendants during discovery, and concerned that the defendants were merely seeking to discover the evidentiary details of the prosecution's case to which they had no right, the court denied the defendants' motion for a bill of particulars. As the government was quick to point out, that decision rests within the sound discretion of the trial court:

> We will reverse a trial court's decision to deny a [motion for a bill of particulars] "only when the trial court clearly abuses its discretion." *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985). Beyond this, we will recognize such an abuse only where the defendant suffers actual prejudice from the denial. *Id. See also United States v. Johnson*, 504 F.2d 622, 627 (7th Cir. 1974). We have consistently held that where the indictment provides sufficient information to inform the defendant of the nature of the charges against him, and the government provides the defendant with information about the alleged overt acts and co-conspirators prior to trial, the defendant has not suffered prejudice from the refusal of the request for a bill of particulars. *Andrus*, 775 F.2d at 843. *See also United States v. Kendall*, 665 F.2d 126, 134-35 (7th Cir. 1981).

United States v. McAnderson, 914 F.2d 934, 946 (7th Cir. 1990). More broadly, the defendant's constitutional rights under the fifth and sixth amendments require that he be informed of the nature of the offense charged to allow him to prepare a defense and to protect his double jeopardy rights; they do not require the government to reveal the details of how it plans to prove its case. *See Kendall*, 665 F.2d at 135.

The indictment and the government's other pre-trial disclosures (and it is proper to look to post-indictment discovery when considering whether a bill of particulars is required, *see, e.g., United States v. Lavin*, 504 F. Supp. 1356, 1361-62 (N.D. Ill. 1981)) provided Glecier with sufficient information concerning the charges against him in the absence of a bill of particulars. First, Glecier had the indictment, which sets forth the time period, the enterprise, the locations, the names of the primary actors, and the methods, means and nature of the racketeering activity. The indictment also refers to Glecier's days both as a private practitioner and as a judge, and thus his argument of "actual surprise" from the fact that one government witness testified as to Glecier's activities before he assumed the bench rings hollow. Second, Glecier had the

information that the government made available through discovery, which included voluminous public records and potential *Brady* material, (*see Brady v. Maryland*, 373 U.S. 83 (1963)), all tape recordings of the defendants, and all material covered by the Jencks Act, 18 U.S.C. § 3500. The government also gave notice to any interested defendant of the names of all co-conspirators not identified in the indictment, as well as the names of cooperating co-conspirators it intended to call at trial, one of whom was made available to Glecier's counsel for pre-trial interview.[5] Finally, the individuals, locations, methods, and case details relating to the *specific* bribes involving Glecier to which the government witnesses testified at trial were in fact listed in the government's *Santiago* proffer (*see United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978)), which Glecier's counsel received well before any of these witnesses testified or this evidence was introduced. Indeed, the fact that Glecier's counsel referred to the subject state cases by name during his opening argument indicates that Glecier was in fact apprised of these cases before trial. So, even granting that it would have been preferable if the government (assuming it was in full possession of these details) had revealed to Glecier before trial the case names and dates of the state court cases in a bill of particulars, the district court's refusal to order the government to do so was not a clear abuse of discretion in light of the extensive pre-trial disclosure that did take place.

III. Evidentiary Rulings

Leaving Glecier's pre-trial challenges behind, we move to the trial. Glecier was tried jointly with two of his nine co-defendants (the other seven pleaded guilty, one on the first day of trial). Both of Glecier's trial co-defendants also were charged in Count One with membership in the con-

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[5] The extent of pre-trial discovery is the primary factor that distinguishes this case from *United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988), relied upon by Glecier.

spiracy that implicated RICO. One of them was, like Glecier, a former judge in the Fifth Municipal District.

As indicated above, among the evidence the government offered in its case-in-chief against Glecier was the testimony of co-conspirators concerning specific state court cases involving Glecier in which bribes had allegedly taken place. Glecier's trial counsel attempted to cross-examine the government witnesses who presented this evidence as to the details of the underlying state cases. The district court, however, did not allow Glecier's counsel to do so. The court also denied the admission of state court transcripts and other evidence proffered in Glecier's defense case, which evidence similarly would have gone to the details of the underlying state cases. The court refused to allow this kind of evidence on the ground that any probative value it might have had was outweighed by the danger that the jury would be misled and confused, in that Glecier's counsel was asking the jury to assess the correctness of the disposition of these state cases. *See* Fed. R. Evid. 403. Glecier claims that the court's ruling was both selective and unfairly prejudicial: the former because, according to Glecier, counsel for his co-defendants and for the government were permitted to explore the facts of subject state cases, and the latter because the refusal precluded Glecier from providing the jury with relevant evidence that would have cast doubt upon the efficacy (and thus likelihood) of the alleged bribes in the subject cases.

Appellants who challenge evidentiary rulings of the district court are like rich men who wish to enter the Kingdom; their prospects compare with those of camels who wish to pass through the eye of a needle. *See* Matthew 19:24. In more secular terms, to prevail in this challenge, Glecier must establish that Judge Norgle abused his wide discretion in managing cross-examination and ruling on the admissibility of evidence. *See United States v. Carter*, 910 F.2d 1524, 1530 (7th Cir. 1990); *McNeese*, 901 F.2d at 598. Further, because it is a "comparison of intangibles," a district court's Rule 403 balancing is afforded a special

degree of deference: "Only in an extreme case are appellate judges competent to second-guess the judgment of the person on the spot, the trial judge." *United States v. Krenzelok*, 874 F.2d 480, 482 (7th Cir. 1989).

Applying these principles, we conclude that Glecier has failed to establish sufficient error in the district court's Rule 403 rulings to warrant a reversal of his conviction. The record reveals that the district court did not preclude Glecier's counsel from vigorously cross-examining government witnesses. To the contrary, Glecier's counsel was given substantial latitude to attack the witnesses with, among other things, additional details concerning the events to which they testified, as long as the questions were directed toward establishing interest, bias, prejudice or some other proper purpose. What the court would not allow, either in cross-examination or in Glecier's defense case, was a detailed exposition of the details of the underlying state cases. This refusal was consistent with the court's general order preventing counsel for all parties from delving into the state cases so as to set up the jury in this case as a "super-" or "appellate-jury," whose putative job it would be to second-guess the propriety of the rulings in and resolutions of the state cases. Contrary to Glecier's suggestion, the court enforced this order against counsel for Glecier's co-defendants as well, and cautioned counsel for the government when its questioning threatened to open the door to such issues.[6] Not only was the court's limiting order evenly applied, but also it was consistent with the Illinois bribery statute that Glecier was accused of violating, which only requires that he accepted property knowing that it was tendered with the intent to influence the performance of his public function as a judge, *not* that

[6] To the extent that the court did allow the admission of certain evidence or transcript portions relating to state court cases at the request of counsel for co-defendants or the government, the record reveals that the evidence was relevant to and offered for some purpose *other than* an exploration of the merits or outcome of the subject state case.

the bribe actually affected the resolution of the case. *See United States v. Garner*, 837 F.2d 1404, 1420-21 (7th Cir. 1987), *cert. denied*, 474 U.S. 1004 (1985). Thus, we find no reversible error in the district court's evidentiary rulings under Rule 403 and in its management of cross-examination concerning the underlying state cases.

IV. Conclusion

At oral argument, counsel for Glecier summarized his primary argument by stating that, because of the indictment's lack of specificity, Glecier "hardly knew what hit him." Reviewing the challenged count in light of established standards for RICO conspiracy indictments, we conclude that Glecier was given sufficient information concerning what was to "hit him" to satisfy federal law. Glecier's other arguments similarly fail to establish reversible error by the district court, and therefore Glecier's conviction is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: January 8, 1991

BEFORE: Honorable William J. Bauer, Chief Judge
Honorable Richard A. Posner, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

No. 88-3417

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DANIEL P. GLECIER,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 87 CR 928, Judge Charles R. Norgle

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 1, 1991.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 88-3417 vs.

DANIEL P. GLECIER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 928—Charles R. Norgle, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* in the above-entitled cause filed by counsel for the defendant-appellant, no judge in actual service has requested a vote thereon and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing *en banc*. It is hereby ordered that the aforesaid petition for rehearing and suggestion for rehearing *en banc* is DENIED.

Supreme Court, U.S.
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(2)

No. 90-1692

In the Supreme Court of the United States

OCTOBER TERM, 1991

DANIEL GLECIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment was sufficient to allege a RICO conspiracy.

2. Whether the district court abused its discretion by denying petitioner's motion for a bill of particulars.

3. Whether the RICO statute is unconstitutionally vague as applied to the facts of this case.

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1–14, is reported at 923 F.2d 496.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1991. A petition for rehearing was denied on February 1, 1991. Pet. App. 16. The petition for a writ of certiorari was filed on May 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner

was convicted on one count of conspiring to conduct and to participate in the affairs of an illegal enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d).

1. The evidence at trial, the sufficiency of which is not in dispute, is described in the government's brief in the court of appeals. In 1977, petitioner was an attorney in private practice in Illinois. His practice included regular appearances before the Fifth Municipal District, a division of the Circuit Court of Cook County, and frequent representation of defendants charged with drunk driving. While in private practice, petitioner paid cash bribes to two state prosecutors, Cary N. Polikoff and James J. Costello, and to circuit court judges in return for favorable dispositions of cases. Gov't C.A. Br. 5–9.

Polikoff first accepted bribes from Alan Masters, another lawyer who practiced in the Fifth Municipal District. Masters introduced Polikoff to several other lawyers, including petitioner, Michael Ettinger, Richard Pezzopane, and William Kampenga, who also began paying bribes. Costello first accepted a payment from petitioner following a favorable disposition of one of petitioner's cases. Shortly afterward, several other lawyers, including Masters, Pezzopane, and Joseph McDermott, also began making payments to Costello. Petitioner and the other lawyers also paid cash bribes to police officers to induce them to alter their testimony. In addition, petitioner and McDermott referred cases to one another and paid cash bribes to circuit court judges to obtain favorable treatment for their clients in traffic violation cases. Petitioner and the other lawyers often discussed among themselves which prosecutors and judges were amenable to taking bribes. Gov't C.A. Br. 5–9, 14.

In 1979, petitioner became a circuit court associate judge. He was eventually assigned to the Fifth

Municipal District. By that time, Polikoff and Costello, the two state prosecutors whom petitioner had bribed, were in private practice. As a judge, petitioner accepted cash bribes from Polikoff in exchange for favorable dispositions of Polikoff's cases; he also accepted bribes for "steering" cases of unrepresented defendants to Polikoff and for allowing Polikoff to solicit clients in petitioner's courtroom. Costello similarly paid cash bribes to petitioner in return for favorable dispositions of two cases in 1983. Gov't C.A. Br. 9–13.

2. Count 1 of the indictment charged petitioner and seven co-defendants with participating in a RICO conspiracy. The indictment described the illegal enterprise as the Circuit Court of Cook County. After identifying petitioner and the other co-conspirators and reproducing the Illinois statutes prohibiting bribery and official misconduct, the indictment charged that petitioner and his seven co-defendants agreed "to conduct and participate in the conduct of the affairs of the Circuit Court of Cook County, directly and indirectly, through a pattern of racketeering activity, as that term is defined in [18 U.S.C. 1961], said racketeering activity consisting of multiple acts involving bribery under [Ill. Rev. Stat. ch. 38, §§ 33–1 & 33–3]." Pet. App. 3. The indictment further alleged that petitioner participated in the scheme before he became a judge, and it identified him as one of the lawyers from whom state prosecutors Polikoff, Costello, and John Brady accepted bribes. *Id.* at 3–4. The indictment also identified petitioner as one of the Fifth Municipal District judges who "did at various times unlawfully accept cash bribes from or on behalf of attorneys, including [six of the co-defendants] and others known and unknown to the Grand Jury, pursuant to an understanding that they would be influenced in, and knowing that the cash bribes were tendered with the intention of influencing

them in, the performance of acts related to their employment and function as judges." *Id.* at 4.

3. Before trial, petitioner moved to dismiss the indictment. He argued that the indictment's failure to specify the individual predicate acts of bribery by listing the specific bribes by date and case name violated the Fifth and Sixth Amendments to the Constitution and Federal Rule of Criminal Procedure 7(c)(1). The district court ruled that the indictment was sufficiently specific and informative, and denied the motion. Pet. App. 4–5.

Petitioner later moved for a bill of particulars on the ground that the indictment's lack of specificity created a danger of unfair surprise and prevented him from adequately preparing his defense. The district court concluded that a bill of particulars was not required because the government's post-indictment disclosures during discovery provided petitioner with sufficient information concerning the charges. The court suggested that petitioner's motion was intended only to elicit the evidentiary details of the government's case. Pet. App. 9; Gov't C.A. Br. 24.

4. The court of appeals affirmed. Pet. App. 1–14. First, the court rejected petitioner's challenge to the legal sufficiency of the indictment. *Id.* at 2–9. The court noted that a defendant is entitled to an indictment that "[1] states all of the elements of the offense charged, [2] informs him of the nature of the charge so that a defense can be prepared, and [3] enables the defendant to evaluate any possible double jeopardy problems presented by the charge." *Id.* at 5 (quoting *United States* v. *Neapolitan*, 791 F.2d 489, 500–501 (7th Cir.), cert. denied, 479 U.S. 939 (1986)). After examining the RICO conspiracy charge in detail, the court found that the indictment properly alleged the essential elements of the offense. Since "Section 1962(d), like all conspiracy provisions, has as its target the act of agreement," the

court explained, "an indictment need only charge—after identifying a proper enterprise and the defendant's association with that enterprise—that the defendant knowingly joined a conspiracy the objective of which was to operate that enterprise through an identified pattern of racketeering activity (here the 'pattern' being multiple acts of bribery prohibited by specified provisions of the Illinois criminal code)." Pet. App. 6. "By specifying the time period during which the alleged conspiracy operated, the locations and courts, the principal actors, and, with some detail, the specific types of predicate crimes to be committed and the *modus operandi* of the conspiracy," the court found that "the indictment adequately enabled [petitioner] to prepare a defense." *Id.* at 6–7. "Similarly," the court noted, "the specific limiting information contained in [the conspiracy count] is sufficient to bar any subsequent prosecution for RICO conspiracy during the same time period and involving the same co-conspirators, enterprise and racketeering activities." *Id.* at 7. The court concluded that "these notice and double jeopardy factors do not require the recitation of specific case names, dates, times and places of alleged bribes." *Ibid.*

Second, the court of appeals rejected petitioner's claim that the district court abused its discretion by denying his motion for a bill of particulars. Pet. App. 9–11. In addition to the indictment, the court pointed out, petitioner "had the information that the government made available through discovery, which included voluminous public records and potential *Brady* material * * *, all tape recordings of the defendants, and all material covered by the Jencks Act, 18 U.S.C. § 3500." *Id.* at 10–11. The court noted that "[t]he government also gave notice to any interested defendant of the names of all co-conspirators not identified in the indictment, as well as the names of cooperating co-conspirators it intended to

call at trial, one of whom was made available to [petitioner's] counsel for pre-trial interview." *Id.* at 11. The court further noted that "the individuals, locations, methods, and case details relating to the *specific* bribes involving [petitioner] * * * were in fact listed in the government's *Santiago* proffer [identifying the co-conspirator statements to be offered at trial], which [petitioner's] counsel received well before any of these witnesses testified or this evidence was introduced." *Ibid.*[1] The court concluded that "the district court's refusal to order the government to [reveal the names and dates of the state court cases in a bill of particulars] was not a clear abuse of discretion in light of the extensive pre-trial disclosure that did take place." *Ibid.*

Third, the court rejected petitioner's challenge to the constitutionality of the RICO statute. The court "join[ed] the First and Third Circuits in re-affirming that the RICO statute is not unconstitutional despite Justice Scalia's statements" in his concurring opinion in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 255–256 (1989). Pet. App. 2 n.1 (citing *United States* v. *Pungitore*, 910 F.2d 1084, 1102–1105 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991), and *United States* v. *Angiulo*, 897 F.2d 1169, 1178–1180 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990)).

ARGUMENT

1. Petitioner contends that the RICO conspiracy charge in the indictment was legally insufficient under the Fifth and Sixth Amendments because it failed to describe in detail the "multiple acts involv-

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[1] The court noted that "the fact that [petitioner's] counsel referred to the subject state cases by name during his opening argument indicates that [petitioner] was in fact apprised of these cases before trial." Pet. App. 11.

ing bribery" that were alleged to constitute the "pattern of racketeering activity." Pet. 5–14.

a. It is well settled "that 'an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *United States* v. *Bailey*, 444 U.S. 394, 414 (1980) (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)); see *Russell* v. *United States*, 369 U.S. 749, 763–764 (1962); *United States* v. *Debrow*, 346 U.S. 374, 376 (1953); *Hagner* v. *United States*, 285 U.S. 427, 431 (1932).

Petitioner does not dispute that the indictment adequately described the elements of the offense. He argues instead that the indictment failed to inform him of the charges against which he was required to defend because it failed to describe the predicate acts of bribery with sufficient specificity. Pet. 7–8. As the court of appeals explained, however, the RICO conspiracy charge, read as a whole, adequately enabled petitioner to prepare a defense because it "specif[ied] the time period during which the alleged conspiracy operated, the locations and courts, the principal actors, and, with some detail, the specific types of predicate crimes to be committed and the *modus operandi* of the conspiracy." Pet. App. 6–7.

Petitioner's insistence that the indictment set forth the specific "facts, circumstances, dates, locations, parties present, case names or bribe amounts" with respect to each bribe, Pet. 8, misperceives the degree of specificity required of a RICO conspiracy indictment. Every indictment reflects a balance between specificity and conciseness, between reciting evidence and making allegations. It has long been established that an indictment should be "a plain, concise and definite written

statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c); see also *Russell* v. *United States*, 369 U.S. at 762–763. It is not the function of an indictment to set forth the evidence; a more thorough preview of the evidence is properly provided, if at all, through a bill of particulars. See *United States* v. *Debrow*, 346 U.S. at 378; *Stokes* v. *United States*, 157 U.S. 187, 191 (1895); *United States* v. *Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986); *United States* v. *Buckley*, 689 F.2d 893, 897 (9th Cir. 1982), cert. denied, 460 U.S. 1086 (1983). In this case, the allegations against petitioner specified that the "pattern of racketeering activity" consisted of "multiple acts involving bribery"; it was not necessary for the indictment to go further and include a recitation of the circumstances surrounding each of the separate acts of bribery. Pet. App. 3; see *United States* v. *Sutherland*, 656 F.2d 1181, 1197 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982).

Petitioner asserts that the indictment was defective because it provided an insufficient double jeopardy bar against future prosecutions for the same offense. Pet. 8–9. But as the court of appeals explained, "the specific, limiting information contained in [the indictment] is sufficient to bar any subsequent prosecution for RICO conspiracy during the same time period and involving the same co-conspirators, enterprise and racketeering activities." Pet. App. 7. Moreover, petitioner is entitled to rely on parts of the record other than the indictment to raise a double jeopardy claim in the event future proceedings are initiated against him. See *Russell* v. *United States*, 369 U.S. at 764; *United States ex rel. Ballard* v. *Bengston*, 702 F.2d 656, 660 (7th Cir. 1983) ("An indictment need not plead offenses in such detail as to be self-sufficient as a bar against further prosecution for the same offense; it is the judgment that constitutes the bar.").

b. Petitioner relies on *Russell* v. *United States*, *supra*, and *Stirone* v. *United States*, 361 U.S. 212 (1960), for the proposition that the indictment allowed him to be convicted on the basis of facts not found by or presented to the grand jury. Pet. 9. Unlike the indictment in *Russell*, however, the indictment here did not "simply repeat the language of the criminal statute" or omit an allegation going to "the very core of criminality." 369 U.S. at 764. Nor does petitioner's conviction rest, as in *Stirone*, on a charge that was not contained in or was different from the allegations of the indictment. 361 U.S. at 215–219. To the contrary, the evidentiary proof in this case was simply a more refined version of the factual allegations made in the indictment. See *United States* v. *Miller*, 471 U.S. 130 (1985).

c. Contrary to petitioner's contention, Pet. 10–11, the court of appeals' decision is consistent with *United States* v. *Phillips*, 874 F.2d 123 (3d Cir. 1989). The RICO conspiracy count in *Phillips* charged two attorneys with conspiring to conduct the affairs of a local court through a pattern of racketeering activity. Like the indictment in this case, the RICO conspiracy count in *Phillips* did not allege specific individual acts of racketeering; it simply stated that the defendants conspired to commit "multiple" acts of bribery and extortion in violation of state law. 874 F.2d at 125. In response to the defendants' claim that the evidence at trial was insufficient to sustain their convictions, the Third Circuit noted that "[w]e were initially troubled by the sufficiency of [the RICO conspiracy count] of the indictment because of its failure to specify, with particularity, which acts of bribery and extortion appellants allegedly agreed to commit." *Id.* at 127 n.4. The court went on

to conclude, however, that the RICO conspiracy count was legally sufficient. *Id.* at 127–128 nn.4 & 5.[2]

The court of appeals' decision is also consistent with *United States* v. *Angiulo*, 847 F.2d 956 (1st Cir. 1988). In *Angiulo*, the First Circuit held that the commission of overt acts is not required for a RICO conspiracy conviction. 847 F.2d at 964. In so holding, the court found that an overt act requirement would be superfluous "because, in any RICO conspiracy indictment the government must allege agreement to commit or the commission of *specified* predicate crimes or, alternatively the collection of unlawful debts." *Ibid.* The court reasoned that the specificity must be "sufficient to alert defendants to the nature of the conspiracy for which they are being charged." *Ibid.* Consistent with that reasoning, the indictment here alleged an agreement to commit specified predicate crimes: bribery in violation of state law. Nothing in *Angiulo* suggests that the predicate racketeering acts must be described in detail in the indictment, rather than generally identified as was done in this case.

d. Petitioner claims that the court of appeals' decision conflicts with its earlier decision in *United States* v. *Neapolitan*, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 939 (1986). Pet. 11–14. The court carefully reviewed *Neapolitan*, however, Pet. App. 7–9, and concluded that it "most certainly does not stand for the proposition that RICO conspiracy in-

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[2] Later, in addressing the defendants' claim that the jury instructions were erroneous, the *Phillips* court noted that "the Seventh Circuit [in *United States* v. *Neapolitan*, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 939 (1986),] required that the predicate acts underlying the RICO conspiracy charge be specified, rather than generally identified as here." 874 F.2d at 130 n.7. The Third Circuit in *Phillips*, however, did not adopt such a requirement. As discussed below, the court of appeals in this case made clear that its decision in *Neapolitan* imposes no such requirement.

dictments must list specific predicate acts in which the defendant was involved," *id.* at 8. In any event, even if the decision in this case conflicted with the Seventh Circuit's earlier decision in *Neapolitan*, the conflict would not warrant review by this Court. Intracircuit conflicts are to be resolved by the court of appeals and do not ordinarily require this Court's intervention. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

2. Petitioner contends that the district court erred in denying his motion for a bill of particulars. Pet. 14–17. The decision whether to require a bill of particulars, however, rests in the discretion of the district court. *Wong Tai* v. *United States*, 273 U.S. 77, 82 (1927). As the court of appeals correctly concluded, the district court did not abuse its discretion by refusing to supplement the government's extensive pretrial discovery with a bill of particulars disclosing the names and dates of the bribes in which petitioner was involved. Pet. App. 9–11.

Petitioner is incorrect when he claims that the pretrial discovery in this case was not an adequate substitute for a bill of particulars. The principal witnesses at trial whose testimony related directly to petitioner were Costello, Polikoff, Kampenga, and McDermott. Although petitioner complains that the proffers identifying the co-conspirator statements to be offered through those witnesses were made only five days before the beginning of the trial, Pet. 16, the proffers were made nearly two weeks before McDermott testified and more than two weeks before Costello and Polikoff testified. Moreover, petitioner's trial counsel interviewed Kampenga three weeks prior to Kampenga's testimony. Gov't C.A. Br. 27–29. In addition, as the court of appeals noted, the government turned over pertinent public records, potentially exculpatory material, and all Jencks Act statements prior to trial. Pet. App. 11.

Petitioner also complains that the court of appeals incorrectly stated that the government turned over "tape recordings of the defendants" when there were no such tape recordings of petitioner. Pet. 16–17. The court's statement refers to the fact that the government turned over all tape recordings involving co-conspirators and cooperating witnesses. Gov't C.A. Br. 27. Petitioner does not dispute that during pretrial discovery he received all the tape recordings that were introduced into evidence at trial.

There is no merit to petitioner's claim that the court of appeals' decision conflicts with *United States* v. *Davidoff*, 845 F.2d 1151 (2d Cir. 1988). Pet. 14–16. In *Davidoff*, the RICO conspiracy count alleged that the defendant conspired to commit extortion offenses including, but not limited to, four substantive extortion counts in the indictment that involved a particular air freight company. At trial, as part of its proof of the RICO enterprise element, the government presented evidence of extortions directed against three entirely different air freight companies not identified in the indictment. 845 F.2d at 1153.

The Second Circuit in *Davidoff* held that "the trial judge exceeded his discretion * * * by denying a bill of particulars identifying at least the victims of discrete extortionate schemes that the prosecution intended to prove." 845 F.2d at 1154. The court found it "simply unrealistic to think that a defendant preparing to meet charges of extorting funds from one company had a fair opportunity to defend against allegations of extortions against unrelated companies." *Ibid.* The court concluded that neither the Jencks Act statements of prosecution witnesses turned over during jury selection and trial nor the 6,000 pages of material concerning wiretap applications and transcripts of wiretapped conversations provided "an adequate substitute for a straightfor-

ward identification in a bill of particulars of the identity of victims of offenses that the prosecution intends to prove." *Id.* at 1155.

The court of appeals' decision in this case is consistent with the Second Circuit's decision in *Davidoff*. The court in *Davidoff* expressly cautioned that it "[did] not mean to imply that even in a RICO case the prosecution must always disclose in advance of trial every act it will prove that may violate some criminal statute." 845 F.2d at 1154; see also *United States* v. *Kaplan*, 886 F.2d 536, 543–544 (2d Cir. 1989). Here, the indictment described the bribery scheme and identified the time period, the locations and courts, and the principal actors and their roles. The government's proof at trial did not go beyond those allegations. In addition, the government's pretrial disclosures revealed "the individuals, locations, methods, and case details relating to the *specific* bribes involving [petitioner]." Pet. App. A11; *id.* at A11 n.5 ("The extent of pre-trial discovery is the primary factor that distinguishes this case from *United States* v. *Davidoff*.").

3. Finally, petitioner contends that the RICO statute is unconstitutionally vague. Pet. 17–20. He primarily relies, Pet. 18, on the concurring opinion in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 255–256 (1989), in which Justice Scalia, joined by three other Justices, expressed doubts about whether the RICO "pattern of racketeering activity" requirement could withstand a constitutional vagueness challenge. The court of appeals here correctly rejected petitioner's vagueness challenge to RICO, and its holding is consistent with the holding of every other court of appeals that has considered that contention in the wake of *H.J. Inc.* See *United States* v. *Coiro*, 922 F.2d 1008, 1016–1017 (2d Cir.), cert. denied, No. 90-1521 (June 17, 1991); *United States* v. *Woods*, 915 F.2d 854, 862–864 (3d Cir. 1990), cert. denied, 111 S. Ct. 1413 (1991); *United States* v.

Pungitore, 910 F.2d 1084, 1102–1105 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1178–1180 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990).[3]

In any event, absent First Amendment considerations, a defendant must show that the statute is vague as applied to the particular conduct with which the defendant is charged. See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–495 & n.7 (1982); *United States* v. *Powell*, 423 U.S. 87, 92 (1975); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). To sustain such a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Whatever ambiguity there may be at the margins of the RICO statute, petitioner's participation—both as a lawyer and later as a judge—in an ongoing bribery scheme to fix cases in the local court over a period of several years unmistakably fell within the

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[3] Before *H.J. Inc.*, as well, the courts of appeals had uniformly held that the RICO statute is not unconstitutionally vague. See, *e.g.*, *United States* v. *Tripp*, 782 F.2d 38, 41–42 (6th Cir.) (reference to state law in predicate acts did not render statute vague), cert. denied, 475 U.S. 1128 (1986); *United States* v. *Ruggiero*, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Martino*, 648 F.2d 367, 381 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); *United States* v. *Morelli*, 643 F.2d 402, 412 (6th Cir.) (collecting cases), cert. denied, 453 U.S. 912 (1981); *United States* v. *Aleman*, 609 F.2d 298, 305 (7th Cir. 1979) (enterprise element), cert. denied, 445 U.S. 946 (1980); *United States* v. *Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (RICO conspiracy), cert. denied, 441 U.S. 933 (1979); *United States* v. *Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

scope of the RICO statute. Cf. *United States* v. *Woods*, 915 F.2d at 862–864. Petitioner's attack on the constitutionality of the RICO statute is therefore without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-1692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL GLECIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

1. The government, of course, does not dispute the fact that Glecier's single count RICO conspiracy indictment failed to allege specifics regarding the alleged "pattern of racketeering activity." Yet, the government maintains that this indictment, although devoid of factual allegations pertaining to the so-called "pattern of racketeering activity", was legally sufficient. In so arguing, however, the government does not address Glecier's contention that the

unspecific indictment did not give recognition to the crime-within-a-crime nature of RICO. *See generally United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986). As noted in our petition, not requiring identification of the specific predicate acts allegedly agreed to and comprising the "pattern of racketeering activity" contravenes the accepted notion that RICO is not actually a new crime, but is a prerequisite for enhanced punishment for violations of other laws. *Id.* From this proposition, it is plain that specific identification of the predicate acts that are part of the alleged "pattern" is necessary.

The government contends that the general allegation that the petitioner supposedly agreed to "multiple acts involving bribery" satisfies the Fifth and Sixth Amendment criminal pleading standards. However, the government fails to address this Court's line of cases that mandate inclusion of the essential *facts* constituting the alleged crime. *United States v. Russell*, 369 U.S. 749 (1962); *United States v. Hess*, 124 U.S. 483, 487 (1888); *United States v. Cruickshank*, 92 U.S. 542, 558 (1875). In addition, Rule 7(c) of the Federal Rules of Criminal Procedure requires factual allegations.[1] Here, in violation of this Court's cases and Rule 7(c), the indictment did not make factual allegations regarding the "pattern" allegedly agreed to by the petitioner. These violations compel the granting of Glecier's certiorari petition.

The government also says a general allegation that the petitioner engaged in "multiple acts of bribery" is sufficient

[1] The government gives lip service to Rule 7(c), but alludes to the notion that a bill of particulars can cure a vague indictment. Govt's Response at 5. This argument is not only hollow, but is ironic, given that the government goes to bat for the denial of Glecier's motion for a bill of particulars.

to put the petitioner on notice. This depth of argument is superficial at best. Obviously, for a meaningful defense to be mounted, specific "pattern" allegations are necessary. Moreover, as a practical matter, the present indictment gave no notice at all with respect to the allegations that formed the core of criminality. Indeed, Petitioner Glecier, as a lawyer and judge, handled thousands of cases during the alleged seven year conspiracy period. Hence, it is absurd to believe that the indictment—which did not specifically identify the alleged "pattern of racketeering activity"—provided sufficient notice from which Glecier could prepare a timely, meaningful and effective defense.

The government concedes that an indictment would be insufficient, and expand the scope of the grand jury's consideration, if it omits an "allegation going to 'the very core of criminality.'" Govt's Response at 9. There can be little debate that the alleged "pattern of racketeering activity" forms the core of criminality in a RICO trial. In fact, the other RICO elements, i.e., existence of the enterprise and the defendant's association (or employment) with the enterprise, are typically *pro forma* points of contention.[2] Thus, there is no good reason for excusing an indictment that fails to set forth specifics regarding the "pattern of racketeering activity" allegedly agreed to by the defendant during the course of a seven year conspiracy. Such omission violates the Fifth and Sixth Amendments.

The government also denies dissonance between the opinion below and *United States v. Phillips*, 874 F.2d 123 (3rd Cir. 1989), *United States v. Angiula*, 847 F.2d 956,

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[2] In this case, the enterprise was the Circuit Court of Cook County. Nobody denied its existence, or the petitioner's association with it. (The petitioner practiced as a lawyer and later worked as a judge in this court system.)

964 (1st Cir. 1988) and *United States v. Gatto*, 746 F. Supp. 432, 459-60 (D. N.J. 1990). *See also United States v. Marino*, 648 F.2d 367, 396 (5th Cir. 1981) ("Absent a *charge* and proof of an agreement to commit two of the *specified* predicate crimes, defendant cannot be convicted of" RICO conspiracy) (emphasis supplied). However, in so doing, it fails to address the actual language of these cases. Indeed, these cases expressly state that *specific* allegations regarding the "pattern" element are required in a RICO conspiracy indictment. *See* Cert. Pet. 10-11 (quoting language of cases). Thus, contrary to the government's argument, a conflict exists and should be reconciled by this Honorable Court.

Furthermore, the government has not reconciled the decision below with *United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986). Again, we must stress that *Neapolitan* rejected the idea that a RICO indictment is sufficient if it alleges general criminal activity, leaving development of the particulars for trial:

> Thus, it would be sufficient, according to this argument, for the indictment to state that the defendant engaged in various acts of bribery. This argument misconceives the nature of any RICO offense. Under the statutory scheme the predicate acts are not only important 'elements of the crime' but they are also by definition, distinct offenses. Because RICO provides for the commission of these predicate crimes in a specified context . . . the failure to specify the underlying criminal activity in the indictment can effectively preclude exact identification of what is being charged. RICO cannot be viewed as a complete offense distinct from the underlying crimes upon which it is based.

791 F.2d at 501. Given this language, there simply is no reconciling the decision below with *Neapolitan*—regardless of what Chief Judge Bauer maintained.

In sum, the decision below is at odds with the very nature of RICO, the constitutional pleading standards established by this Court, Rule 7(c) of the Federal Rules of Criminal Procedure, decisions from other circuits and the Seventh Circuit's prior decision in *Neapolitan*. Accordingly, the petition for certiorari should be granted.

2. The petitioner, a judge, was put to trial for RICO conspiracy, an offense carrying a possible twenty year prison term. The indictment was vague. A bill of particulars was refused. The court of appeals affirmed the denial of the bill of particulars.

In response to the petitioner's point regarding the denial of the bill of particulars, the government resorts to the supposed extensive pre-trial discovery. It dismisses the lack of ample notice by noting that the *Santiago* proffer, filed a mere five days before trial, was filed "nearly two weeks before McDermott testified and more than two weeks before Costello and Polikoff testified." Govt's Response at 11. However, in a trial where a man's liberty and livelihood are at stake, two weeks simply is insufficient time in which to investigate and prepare a defense to dated allegations which spanned seven years.[3] It should be remembered that "the adversary system of trial is hardly an end to itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82 (1970). In this case, the government's close-to-the-vest tactics rendered the trial more akin to a poker game than a fair and balanced adversarial process. The denial of the

[3] The government also points out that Glecier's counsel interviewed William Kampegna three weeks before trial. The government does not point out that Kampegna denied paying any money to Judge Glecier.

motion for a bill of particulars constituted an abuse of discretion. Certiorari should be granted.

The government further contends that there is no conflict between *United States v. Davidoff*, 845 F.2d 1151, 1154 (2nd Cir. 1988) and the Seventh Circuit's opinion this case, given the alleged pretrial discovery provided here. This argument overlooks the text of *Davidoff*. In *Davidoff*, the court stated, "[n]or can the Government excuse the lack of a bill of particulars by contending that information concerning [the victims not specified in the indictment] was contained in Jencks Act statements" turned over during jury selection and during the trial. In addition, the government in *Davidoff* tendered "some 6,000 pages" of wiretap material; however, the *Davidoff* court deemed this turn-over as an "equally inadequate" cure for the lack of bill of particulars. *Davidoff*, 845 F.2d at 1155. Thus, contrary to the government's contention, a difference in pretrial discovery is not a sufficient basis upon which to distinguish *Davidoff*. A conflict exists and should be remedied by this Honorable Court.

It is true that the *Davidoff* court stated that the prosecution would not be required to "disclose in advance of trial every act it will prove that may violate some criminal statute." 845 F.2d at 1154. In this case, Petitioner Glecier was not asking for disclosure of every act. He merely requested, by way of a bill of particulars, the specifics regarding the alleged "pattern of racketeering activity." This certainly was not asking too much, especially in light of the fact that the alleged "pattern of racketeering" represented the core criminal allegations in dispute. A bill of particulars should have been granted.

3. In addressing the petitioner's point that the RICO statute is void for vagueness, the government says little. It does not adequately face the dissension on this

Court or the reoccurring criticism regarding RICO's ambiguous terms. In any event, given the unrest, the question of RICO's constitutionality will not dissipate or go away. This case presents an opportunity for this Court to address this important issue.

The government claims that RICO withstands constitutional scrutiny in this case because the petitioner allegedly has not shown that the statute is vague as applied. We disagree. The petitioner was charged with agreeing to a "pattern of racketeering activity" consisting of unspecified "multiple acts of bribery." As applied, these allegations are void for vagueness. First, if the meaning of the "pattern" requirement cannot be ascertained as general matter, see *H.J., Inc. v. Northwestern Bell Telephone*, 492 U.S. 229 (1989) (Scalia, J., concurring), it certainly could not have been deciphered by the petitioner in this case. Furthermore, absent *specification* of alleged "multiple acts of bribery" comprising the "pattern", the indictment's allegations were facially vague. The petitioner was deprived of notice required by the Due Process Clause. Certiorari, therefore, should be granted.

Respectfully submitted,

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